

IN THE MATTER OF MERCANTILE SEAMAN'S DOCUMENTS NO. Z-1121404 AND ALL

Issued to: William W. Willis, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1529

William W. Willis, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 25 March 1965, an Examiner of the United States Coast Guard at New Orleans, Louisiana suspended Appellant's seaman documents for twelve months upon finding him guilty of misconduct. the three specifications found proved allege that while serving as a wiper on board the United States SS ARIZPA under authority of the document above described, on 5 January 1965, Appellant was absent from the vessel without permission and failed to perform his duties; on 6 January 1965, he failed to join the vessel; and on 22 January 1965, Appellant assaulted and battered a member of the crew, oiler O'Brien. Two other specifications were found not proved.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The first two specifications were proved by entries in the ship's Official Logbook; the assault and battery was proved by the testimony of the victim which was taken by deposition. Appellant did not introduce any evidence pertaining to the three specifications found proved.

FINDINGS OF FACT

On a foreign voyage including the dates of 5 through 22 January 1965, Appellant was serving as a wiper on board the United States SS ARIZPA and acting under authority of his document.

While the ship was at Bremerhaven, Germany on 5 January, Appellant was absent from the ship without permission and failed to perform his regular duties as a wiper between 0815 and 1500.

On 6 January, Appellant failed to join his ship upon her departure from Bremerhaven at 0000. Appellant rejoined the ship at 2300 on 6 January in Rotterdam, Netherlands.

On 22 January at Le Harve, France, Appellant attacked oiler O'Brien with brass knuckles when O'Brien refused to loan money to Appellant. There were no other

eyewitnesses present as Appellant struck O'Brien on the face, knocking him to the deck. When O'Brien tried to get up, Appellant knocked him unconscious. One lens of the eyeglasses O'Brien had been wearing was broken.

O'Brien was taken to a hospital as soon as possible since he was seriously injured. His nose was broken and face badly lacerated. His mouth and lips were cut and swollen, one front tooth was knocked out, and both eyes were swollen closed.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that since assault and battery with a dangerous weapon was not alleged, the maximum permissible order is six months' outright suspension according to the Table of Average Orders (46 CFR 137.20-165). An examiner may only reduce the suspension from that which is shown in the Table for a particular offense. It would be denial of due process to allow an examiner to impose any period of suspension at his discretion.

Therefore, the order of twelve months' suspension is unreasonable, improper and unconstitutional. It should be modified to a suspension for a period not exceeding six months.

OPINION

The means by which Appellant assaulted and battered oiler O'Brien is not alleged in the specification. The evidence that Appellant used brass knuckles is contained in the uncontradicted testimony of O'Brien which was not objected to when his deposition was received in evidence at the hearing (R. 75). This was an aggravated offense of "assault and battery" due to the use of a dangerous weapon, the extensive injuries suffered and the fact that O'Brien was wearing glasses when attacked. Consequently, the Examiner was not precluded from entering the instant order simply because the Table of Average Orders shows a suspension of six months for a first offense of "assault and battery." This is obvious not only from the fact that the Table is one of "average" orders rather than "maximum" orders but also from the wording of 46 CFR 137.20-165(a) which states:

"The Table 137.20-165 is for the information and guidance of examiners. The Orders listed for the various offenses are average only and should not in any manner affect the fair and impartial adjudication of each case on its individual facts and merits."

From the point of view of a variance between the allegations ("assault and battery") and the proof ("assault and battery with a dangerous weapon"), it is proper to consider the evidence that a dangerous weapon (brass knuckles) was used because the proof in administrative proceedings is not limited to the allegations in the pleadings, provided there has been actual notice of the issues involved so that there is ample opportunity to introduce evidence. Kuhn v. C.A.B., 183 F.2d 839 (D.C. Cir.

1950). There was no claim of surprise by Appellant and he was free to testify or introduce other evidence in rebuttal after the deposition of O'Brien was received in evidence. At this point, the defense rested without questioning the contents of the deposition (R. 75).

Finally, there is not the slightest doubt that the viscous attack on O'Brien justifies the order imposed despite Appellant's prior clear record as a merchant seaman.

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on 25 March 1965, is AFFIRMED.

W. D. Shields
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 18th day of November 1965.

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